(3)

No. 87-2019

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

KAREN PINEMAN, ALPHONSE MAROTTA, DANIEL CLIFFORD, JUDITH NARUS, ROSE SCHEWE and ALFRED K. TYLL,
Petitioners,

v.

WILLIAM J. FALLON, Chairman of the State Employees Retirement Commission, HENRY E. PARKER, Treasurer of the State of Connecticut, and J. EDWARD CALDWELL, Comptroller of the State of Connecticut,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF THE CASE

[The respondents respectfully direct the Court's attention to the facts of this case as set forth by the district court throughout its opinion in *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) *("Pineman V")* and as set forth in the respondents' uncontroverted Contentions of Fact from *Pineman V*, which contentions have been lodged with the Court and are referenced in Footnote 1 herein.]

[References to "Petition" are to petitioners' instant Petition for a Writ of Certiorari.]

SUMMARY OF ARGUMENT

There is no important reason for granting this petition as the constitutional issues herein have been decided by this Court, and the specific issues involved merely derive from the particular facts of this case.[1] In addition, the lower court's finding that the 1975 revision of the Connecticut State Employees' Retirement Act did not violate the Contract Clause, Taking Clause or Due Process Clause is sound and in accord with all applicable decisions of this Court. Finally, the petitioner takes issue not with the statement of the law as enunciated by the district court and court of appeals but rather with the application of that law to the facts of this case.

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[1] The respondents have lodged with the Court their Contentions of Fact filed with the district court in *Pineman V*, which contentions are uncontroverted and with respect to which no counter-contentions were filed by petitioners.

ARGUMENT

THERE IS NO IMPORTANT REASON FOR GRANTING THIS PETITION AS THE CONSTITUTIONAL ISSUES HEREIN HAVE BEEN DECIDED PREVIOUSLY BY THIS COURT, AND THE PETITIONER IS MERELY DISAGREEING WITH THE APPLICATION OF THE RELEVANT CASE LAW TO THE FACTS OF THIS CASE.

A. The Holding Of The Lower Courts Comports With The Applicable Decisions Of The United States Supreme Court.

The respondents respectfully submit that the decisions of the Connecticut Supreme Court, the United States District Court, and the Court of Appeals for the Second Circuit in this case are not in conflict with the applicable decisions of this Court. As early as 1937 this Court held that a statute fixing salaries is presumed not to intend the creation of private contractual or vested rights but merely to declare a policy to be pursued until the legislature decides otherwise. *Dodge v. Board of Education*, 302 U.S. 74, 78–79 (1937); *see also Flemming v. Nestor*, 363 U.S. 603 (1960). Relying on the oft-cited case of *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), the petitioners suggest that this Court's rejection of the Indiana Supreme Court's opinion somehow bolsters their claim that contractual obligations were created by the Connecticut legislature (Petition, p. 8). In *Indiana ex rel.* the Court noted that the Indiana legislature used the word "contract" 25 times in the subject legislation, thereby indicating a clear intent to bind itself contractually, *Id.* at 105, unlike the Connecticut statute which no court has found to indicate any intent to contract. *Cf.* Connecticut General Statutes Section 2-14a. (See respondents' Appendix.) Likewise, in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the petitioners seek to find support for their assertion that the 1975 Act was a "major, unforeseen and retroactive" change in pension funding,

"without moderation or reason, in the spirit of oppression." (Petition, pp. 8–9.) *Allied* involved a private, contractual pension plan which the Court found to have been "grossly distorted" by a law "not even purportedly enacted to deal with a broad, generalized economic or social problem." *Allied*, 438 U.S. at 250. In *United States v. Larionoff*, 431 U.S. 864 (1977), the court held that the entitlement of government workers to pay and benefits "must be determined by reference to the statutes and regulations governing compensation . . . rather than to ordinary contract principles." *Pineman V*, 662 F. Supp. 1311, 1316 (D. Conn. 1987), quoting *Larionoff*, 431 U.S. at 869. *See also American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 707 F.2d 548 (D.C. Cir. 1983). In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), a case the petitioners suggest was not applied by the district court to invalidate the 1975 Act, the Second Circuit noted that while the method of analysis in that case may have been helpful to the petitioners, the result — that no compensable taking occurred — was not. *Pineman v. Fallon*, 842 F.2d 598, 602 (2d Cir. 1988), *("Pineman VI")*. Last, despite petitioners' claim to the contrary (Petition, p. 7), the Connecticut Supreme Court in *Pineman v. Oechslin*, 195 Conn. 405, 588 A.2d 803 (1985) *("Pineman III")* did not hold that a *state* could never be found to have created an implied contract, but rather that a state *legislature* must evidence an intent to contract in order for a statute to take on contractual dimensions. *Pineman III* at 416.

B. The Petitioner Does Not Suggest That The Statement Of The Law By The Lower Courts Is Incorrect But Rather That The Courts Somehow Misapplied That Law To The Particular Facts In This Case.

With respect to the Contract Clause, the petitioners apparently do not disagree with the federal courts' statement of the law but rather disagree with its application. At pages 7 and 9 of their petition, the petitioners allege that the lower courts gave "undue" deference to the Connecticut Supreme Court's ruling in *Pineman III*. The district court noted that

while giving great significance to the holding of the Connecticut Supreme Court in *Pineman III*, the federal court "must make an independent determination whether the retirement arrangement at issue in this case is indeed a 'contract' for the Contract Clause purpose," *Pineman V*, 662 F. Supp. at 1315. It was the petitioners themselves who pointed to language in handbooks provided to their class which describes procedures for those employed by the state for less than ten years. As the district court found, rather than supporting petitioners' claim that a contract exists, the language bolsters respondents' claim that the intent of the State is to confer benefits only upon the full completion of all terms of eligibility, i.e., when rights to benefits vest. *Id.* at 1316. Viewed against the backdrop of this Court's ruling in *Larionoff*, and of the District of Columbia Circuit's opinion in *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984), the voluminous factual foreground in this case led the court to the conclusion enunciated in *National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985) ("Amtrak"), that "[p]olicies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.*, 470 U.S. at 466.

With respect to their Taking Clause claim, the petitioners relied on and continue to refer to *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986). The Court in *Connolly* restated the requirement that Taking Clause cases require "[a]d hoc, factual inquiries into the circumstances of each particular case," and that particular significance must be accorded to the following factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.*, 475 U.S. at 224-25. Here, again, the facts adduced by the district court do not substantiate the petitioners' claim, but, in fact, run afoul of the petitioners' suggested reliance on *Connolly*. As the Second Circuit recently noted, the State of Con-

necticut did not physically invade or permanently appropriate any of the employees' assets for its own use, nor did the Act have a severe economic impact as any additional contributions to the plan are balanced by increased benefits. The petitioners' assertion on page 10 of their Petition that petitioner Pineman must work and contribute for five additional years to receive benefits, or lose everything, is wholly untrue. If Ms. Pineman retired at age 50, she would begin receiving benefits (based on her years of service) upon turning 55 and if she elected to work five (5) years longer would receive dramatically higher benefits. (See respondents' Contentions of Fact Nos. 48 and 49 referenced in Footnote 1.)

Finally, as to petitioners' Due Process Clause claims, it is suggested that state employees have a property interest in the retirement fund and retirement benefits which are protected under the Due Process Clause from arbitrary legislative action. The substantive due process test is whether the action is rationally related to a legitimate state interest. *Pineman VI* at 601 (citations omitted). In the instant case, the 1975 legislative action in question was an obvious response to the *Fitzpatrick v. Bitzer,* 390 F. Supp. 278 (D. Conn. 1974) *aff'd in part and rev'd in part on other grounds,* 519 F.2d 559 (2nd Cir. 1975) *aff'd in part and rev'd in part on other grounds,* 427 U.S. 445 (1976) decision which condemned the disparate treatment of men and women in the state retirement system. The legislature's decision to raise the age of retirement for female employees is in conformity with *Heckler v. Mathews,* 465 U.S. 728 (1984) and *Orr v. Orr,* 440 U.S. 268 (1979), and as an economic adjustment comes to the Court with a presumption of constitutionality. *Ursery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15 (1976). Moreover, the raising of Social Security levels and the concomitant increase in the State's burden of funding these taxes on behalf of its employees produced a reciprocal effect of reducing employee contributions. Connecticut's retirement system was one of the most poorly funded in the country and one of the most expensive based on percentage of payroll. Though petitioners continue to maintain that the 1975 Act constituted the "nadir of

irrationality," they offered no evidence to contradict the economic data presented by the respondents and utilized by the Connecticut legislature. (See respondents' Contentions of Fact referenced in Footnote 1.)

CONCLUSION

For all the foregoing reasons, the respondents respectfully request that the Court deny the Petition seeking a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

§ 2–14a. Legislation affecting municipal retirement systems

The general assembly shall enact no legislation which diminishes or eliminates the rights or benefits granted to any individual under any municipal retirement or pension system. Nothing contained herein shall prevent any municipality, covered under the Connecticut Municipal Employees Retirement Act, from becoming a member of the Old Age and Survivors Insurance System under Title 2 of the Social Security Act.

(1963, P.A. 619.)